

APPEAL NO. 030980
FILED MAY 30, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 20, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the compensable injury extends to and includes a herniated disc at L5-S1; that the claimant has disability beginning on November 1, 2002, and continuing through the date of the CCH; and that the appellant (carrier) waived the right to dispute the compensability of the claim. The carrier appealed, arguing that the determinations of the hearing officer were against the great weight and preponderance of the evidence. The claimant responded, urging affirmance.

DECISION

Affirmed.

The claimant had the burden to prove that he sustained a compensable injury, that the injury included a herniated disc at L5-S1, and that the injury resulted in disability as defined by Section 401.011(16). There is conflicting evidence in this case. The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer noted in his statement of the evidence that the medical evidence reflects that the claimant was injured at work on _____, and has not been released to full duty since that injury. Our review of the record reveals that the hearing officer's injury, extent-of-injury, and disability determinations are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Thus, no sound basis exists for us to disturb those determinations on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

WAIVER

It is undisputed that the carrier received written notice of the claimed injury on _____. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated _____, with a stamp in the lower right hand corner which states "Acknowledged November 1, 2002, Not Filed [Texas Workers' Compensation Commission (Commission)]". The TWCC-21 stated in part that benefits will be paid in accordance with the Texas Workers' Compensation Act. The hearing officer noted in his statement of the evidence that the carrier had no acknowledgement form as required by Advisory 2002-15. We disagree. The TWCC-21 dated _____, on its face contains the acknowledgement from the Commission.

The Appeals Panel has had occasion to review and write on several cases involving the application of Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) to the issue of carrier waiver. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the decision in Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, was overruled. In discussing the application of Downs, Appeal No. 030380-s, *supra* states: "The Supreme Court said: 'Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability.'" In the case before us, the carrier presented evidence that it took action on this claim within seven days of receiving its first written notice of the claimed injury as required by the Downs decision.

On November 12, 2002, the carrier completed a second TWCC-21 contesting compensability of the claimant's injury which is date-stamped as having been received by the Commission on November 12, 2002. The box at the bottom of the TWCC-21 dated November 12, 2002, states that a copy of the document was mailed to the claimant. However, the claimant testified that he did not see a copy of the TWCC-21 until the day of the benefit review conference on January 13, 2003. The hearing officer specifically found that the carrier did not provide a copy of the TWCC-21 as required. By its plain language, Section 409.021(a) requires notice to the Commission and the claimant only when the carrier is refusing to pay benefits within seven days of receipt of written notice of the injury. There is no such requirement for the carrier to send notice to the claimant of its intent to pay benefits. Texas Worker's Compensation Commission Appeal No. 030768-s, decided May 8, 2003. Therefore, the hearing officer's determination that the carrier failed to provide the claimant a copy of the TWCC-21 as required does not necessitate a determination of carrier waiver regarding the "cert-21" dated October 31, 2003. However, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §124.3(a) (Rule 124.3(a)) provides that "if the carrier believes that it is not liable for the injury or that the injury was not compensable, the carrier shall file the notice of denial of a claim (notice of denial) in the form and manner prescribed by §124.2 of this title (relating to Carrier Reporting and Notification Requirement)." Rule 124.2(d) provides that the carrier "shall notify the Commission and the claimant of a denial of the claim (Denial) based on non-compensability or lack of coverage...." The Appeals Panel held in Appeal No. 030768-s that the carrier is required to provide notice to the claimant of its contest of compensability. Furthermore, the Appeals Panel noted in Appeal No. 030768-s that neither Section 409.021 nor Rule 124.2 directly answer the question of the time limit for the carrier to provide notice of the dispute of compensability to the claimant where, as here, the carrier agreed within the 7-day period to pay benefits, but then contested compensability of the injury within the 60-day period. However, the Appeals Panel additionally held in Appeal No. 030768-s that the 60th day after the carrier received written notice of the injury would be the outside limit for the carrier to give notice of the denial to the claimant as that is the outside limit for providing the notice of the denial to the Commission while noting that from reading of Section 409.021 and Rule 124.2 appears that the Commission contemplated that the required notification of denial to the claimant will be accomplished either at the same time as notification to the Commission or within a short time thereafter. Since the hearing officer found that

the “carrier did not provide the claimant a copy of the TWCC-21 [dated November 12, 2002, which contested compensability] as required” we affirm the hearing officer’s determination that the carrier waived the right to dispute the compensability of this claim. See Texas Workers’ Compensation Commission Appeal No. 023262, decided February 19, 2003, and Appeal No. 030768-s, *supra*.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge